Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

October Term 2002

ESTRELLITA G. MIGUEL,

Petitioner,

vs.

THE BANK OF NEW YORK TRUSTEE, under the Pooling & Servicing Agreement Series 1995 B; ALLIANCE BANCORP, a corporation; and COUNTRYWIDE FUNDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to the Truth-In-Lending Act provisions of Sections 1635(f) and 1641(c) of Title 15, is timely service of a borrower's written notice of cancellation, which is sent to the servicing agent only, effective notice to his or her current, unidentified assignee of the timely exercise of the right to rescind the underlying mortgage transaction?

2. Pursuant to the Truth-In-Lending Act provisions of Sections 1635(f) and 1641(c) of Title 15, if timely service of a borrower's written notice of cancellation, which is sent to the servicing agent only, is not effective notice to his or her current, unidentified assignee of the timely exercise of the right to rescind, does a court of appeals have the power or is it an abuse of discretion for it to reverse on appeal a factual determination made by the district court that the assignee had admitted that it had had timely knowledge of such notice nevertheless, and to remand for the entry of a dismissal with prejudice for lack of subject matter jurisdiction?

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon Section 1635 of Title 15 of the United States Code.

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on March 24, 2003, within ninety days (weekends excluded) of the denial of reconsideration and the amendment on December 23, 2002, of the court of appeals' published opinion, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The court of appeals' amended decision being challenged is set forth in the Appendix to this Petition, reported at 309 F.3d 1161 (9th Cir. 2002), and the relevant text of the Truth-In-Lending ("TILA") principal governing provisions of law, Section 1635(f) and Section 1641(c) of Title 15, are footnoted in the text of this Petition.

III. STATEMENT OF THE CASE

Miguel and her husband refinanced their home with Alliance Bancorp. The loan papers were dated December 1, 1994, and the loan transaction closed on December 2, 1994.

Alleging TILA violations, Miguel sent a timely cancellation letter to the servicing agent, Countrywide, who she thought was her mortgagee, on November 7, 1997, demanding rescission, which was not responded to.

Unknown to Miguel at the time, The Bank of New York Trustee ("BONY") was the holder of her mortgage, having received an undisclosed assignment of her mortgage dated December 1, 1994, the day before closing, which was actually "table-funded," yet not recorded until October 1996.

Miguel filed suit in district court for rescission against Countrywide on April 21, 1998, and then for the first time, learning that BONY was the owner of her mortgage, amended her complaint -- with the approval of the district court -- on June 17, 1998, to add BONY as a defendant.

In pretrial proceedings, the district court on June 3, 1999, rejected BONY's contention that Miguel's claims were time-barred because she had not sent her cancellation letter to BONY, but to its servicing agent instead, finding that BONY had received Miguel's notice of rescission and had knowledge thereof within three years of the loan transaction:

> Defendant Bank of New York raises for the first time in its reply memorandum the argument that Plaintiff's claims are time-barred because her attempted rescission was ineffective, as it was not submitted to "the creditor." . . . . Defendant Bank of New York contends that Plaintiff's attempted rescission was ineffective because it was mailed to Countrywide Funding Corporation, Defendant Bank of New York's servicing agent rather than Alliance Bancorp [the original creditor]. .
> * * * *
> [T]he court concludes in this case that it is both fair and consistent with the purpose of TILA to hold that Plaintiff's notice of rescission was effective as to Defendant Bank of New York where Plaintiff sent the notice directly to Defendant Bank of New York's agent. This is so particularly when Plaintiff was told to mail her payments to Defendant Bank of New York's agent.
> * * * *
> Although the court concludes that Plaintiff's notice of rescission was effective, it is unable to determine at this stage of the litigation whether it was timely. If the facts are as Plaintiff maintains [that there was a TILA violation], the Notice of Right to Cancel was defective. If the Notice was defective, Plaintiff had three years in which to rescind her loan agreement. **Defendant Bank of New York admits that it received Plaintiff's notice within three years of the loan**

> **transaction**. ("Order Denying Defendant Bank of New York's Motion For Summary Judgment, etc.," June 3, 1999.) [Emphasis added].

The case proceeded to trial on June 1, 1999, at which time the district court found TILA violations and that Miguel had properly rescinded her mortgage, and granted judgment in her favor.[1] That was the only issue tried by pretrial order. Alliance Bancorp and BONY appealed.

On appeal, the court of appeals first reversed with instructions to dismiss the case with prejudice for lack of subject matter jurisdiction, holding that service of a TILA cancellation notice on the servicing agent was not effective notice to an assignee, and that there was no evidence below that BONY had had actual knowledge of that cancellation notice within three years of the consummation of the mortgage loan.

Following Miguel's petition for reconsideration, calling to the attention of the court of appeals that the district court had found prior to trial that BONY "admits that it received Plaintiff's notice within three years of the loan transaction," *supra*, the court of appeals amended its published opinion to inexplicably delete its initial conclusion that "Miguel has presented no evidence that the Bank received notice of cancellation within the three-year limitation period prescribed by statute," but nevertheless, still remanded with instructions for the district court to dismiss the TILA case *with prejudice*, continuing to ignore the district court's record factual finding altogether and the fact that no such evidence of actual notice was presented at trial because of the district court's earlier pretrial order which was at trial considered to be the law of the case.

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[1] See Section 1635(f) in relevant part: "an obligor's right of rescission shall expire three years after the date of consummation of the transaction."

IV. LEGAL ARGUMENT

This Petition is based upon two legal arguments, *first*, that the court of appeals was in error when it concluded that serve of a TILA notice of cancellation upon a servicing agent is not service of notice of cancellation upon an assignee as a matter of law, and, *second*, that that the court of appeals was in error, were either (a) such actual service upon an assignee or (b) the actual knowledge of cancellation by an assignee required, when it overrode the contrary factual finding of the district court, *supra*, and in any event remanded the case to the district court with instructions to dismiss the case with prejudice for lack of subject matter jurisdiction in the absence of any such factual inquiry at trial due to Miguel's justified reliance upon the district court's pretrial orders.

1. The service of a timely TILA notice of cancellation upon a servicing agent is effective against an assignee.

The court of appeals was mistaken, ignoring two thousand years of the law of agency and is in conflict with every federal court that has considered the issue, when it concluded that "no authority supports the proposition that notice to Countrywide should suffice for notice to the Bank."

For instance, in Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002), the eleventh circuit court of appeals only thirteen weeks before the court of appeals' first decision here, held that a mortgage servicer is not only a "real party in interest" and the "legal representative of the mortgagee" in actions concerning the mortgage, but cited approvingly, by way of example, language from an Alabama district court's decision in Myers v. Citicorp Mortgage, Inc., 878 F. Supp. 1553, 1558 (M.D. Ala. 1995), *affirmed*, 208 F.3d 1011 (11th Cir. 2000), that for practical purposes "the servicing agent of a mortgage was the 'assignee of the creditor as defined in the Federal Truth in Lending Act'".[2]

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[2] See Section 1641(c): "any consumer who has the right to rescind a transaction under section 1635 of this title may

In Myers, *supra*, the factual issue centered around the manner in which mortgages are freely exchanged back-and-forth between servicers and assignees in the secondary mortgage market without notice, much like a basketball is tossed about in the NBA -- the district court in Myers determining that the mortgage servicer there had briefly held ownership rights as a part of its servicing contract; no such factual inquiry was ever made in Miguel's case, however, concerning the details of Countrywide's servicing contract, another key reason why dismissal with prejudice was clearly premature and inappropriate here under any circumstances.

An Oklahoma federal district court recently was similarly satisfied that a TILA rescission could be effective if notice of cancellation were served upon the servicing agent, ironically dismissing the borrowers' case there pursuant to a *res judicata*/compulsory counterclaim theory, because the borrowers had not included the servicing agent in any counterclaim in a contemporaneous state court foreclosure action in which they chose to default, relying on their federal TILA lawsuit instead, the Oklahoma district court concluding that "the servicing agent of the original obligee and mortgagee is in privity with it and its assignee" as far as TILA rescission claims are concerned, yet was not sued in state court by the borrowers Kittel v. First Union Mortgage Corporation, 2001 U.S. Dist. LEXIS 24403 (W.D. Okl. 2001), *stayed on other grounds*, 303 F.3 1193 (10th Cir. 2002) ("the Kittels do not contend that the state court could not have acquired jurisdiction over First Union Mortgage Corporation," the servicing agent in Kittel, so as to have asserted its TILA rescission defense against the mortgage servicer there).

Federal law should treat creditors and borrowers alike; there should obviously as a matter of law not be one rule concerning TILA standing for creditors and an opposite rule concerning TILA standing for borrowers.

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rescind the transaction as against any assignee of the obligation."

2. If service of a TILA notice of cancellation to be effective must be served upon an assignee and not upon its servicing agent, and if an assignee needs to have actual timely knowledge of such service of a TILA cancellation notice regardless of such knowledge by its servicing agent, that is a factual determination as to the existence of subject matter jurisdiction for the district court and not for the circuit court to have made.

It was fundamentally unfair, without precedent, and contrary to the decisions of all other federal courts having considered the matter, *supra*, for the court of appeals in reversing, remanding for a dismissal with prejudice for lack of subject matter jurisdiction, to so cavalierly reject, without a single citation to relevant authority, the pretrial finding of the district court that BONY had had timely knowledge of Miguel's TILA cancellation supporting the district court's judgment following a full trial on the merits of Miguel's TILA claim.

For instance, in Beach v. Owen Federal Bank, 523 U.S. 410 (1998), a judgment on the merits by the Florida state courts *and not a dismissal for lack of subject matter jurisdiction*, 692 So.2d 146 (1997), *affirming* 670 So.2d 986 (1996) (*en banc*), was upheld by the United States Supreme Court – the state lower court case in Beach never having been dismissed for lack of subject matter jurisdiction despite a finding of a lack of timely cancellation on the part of the borrower, as here, which in both Beach and Miguel was a factual issue and not grounds for dismissal with prejudice as a matter of law.

State and federal district courts clearly have jurisdiction over such cases pursuant to Section 1641(c) of Title 15 of the United States Code. The court of appeals in Miguel has confused "subject matter jurisdiction" with "subject matter enforcement jurisdiction" -- the latter depriving federal courts, having subject matter jurisdiction, from enforcing that TILA subject matter jurisdiction where factually it can be shown that the cancellation was not timely.

Even if the district court had concluded, to the contrary, that BONY had not had timely knowledge of Miguel's cancellation, since the loan was "table-funded," *supra*, as a matter of controlling state law as to the validity of the underlying mortgage and as to the status of the parties, BONY, who actually funded the Miguel loan, was in fact the "original creditor" of Miguel as a matter of state law, Beneficial Hawaii, Inc. v. Kida, 96 Haw. 289, 30 P.2d 895 (2001), rendering the factual notice inquiry overridden by the court of appeals in this instance as a matter of controlling state law both moot and utterly redundant.

BONY, furthermore, should have been *estopped* as a matter of sound judicial policy from changing its story on appeal to assert that it had no timely knowledge of Miguel's TILA cancellation letter sent to its agent after all.

Not only did BONY not contest the district court's pretrial finding before trial, *supra*, when it was first entered.

BONY concealed from Miguel the fact of its ownership of the mortgage until after she had cancelled and filed suit and was outside the three-year limitation, having table-funded the loan, *supra*, immediately taking a written assignment even the day before the loan was actually made, yet having cagily waited for two years before its public recordation, intentionally or otherwise misleading Miguel, no knowledge given to her that an entity called BONY even existed, leading Miguel furthermore to reasonably believe Countrywide to be the current assignee.

Admitting to the district court that it had known of the cancellation within three years of the loan's making, BONY has thus sought to take inconsistent positions before the district court and on appeal, for which it should now be estopped from denying having had such knowledge; see, *e.g.*, United States v. Bentson, 947 F.2d 1353, 1354 (9th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992); Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 218-219, 664 P.2d 745 (1983) (citations omitted):

> This type of equitable estoppel is also known as judicial estoppel. This doctrine is not simply one of estoppel but "partakes rather of positive rules of procedure based on manifest justice and, to a greater or less [sic] degree, on consideration of the orderliness, regularity, and expedition of litigation." At stake is the integrity of the judicial process. A party is estopped from playing "fast and loose" with the court or blowing "hot and cold" during the course of litigation.

V. CONCLUSION

For all of the above reasons, the amended decision of the court of appeals should be reversed, and the case remanded to the court of appeals for a determination of the remaining issues on appeal that as a result of its amended opinion remain unaddressed.[3]

Respectfully submitted,

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March 24, 2003

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[3] The remaining two issues are: (1) whether Miguel should have been permitted an evidentiary hearing to first determine whether any inability on her part to refinance within the time specifically allotted by the district court following her TILA award, which inability was due to the adverse effect of BONY's wrongful state court action upon her creditworthiness, should be considered in modifying the terms and conditions of the conditional rescission awarded to her, and (2) whether an assignee is liable for her attorneys' fees and costs pursuant to the TILA judgment that was entered by the district court, which of course also bears materially on her financial ability to successfully refinance.